

The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; and STATE OF WISCONSIN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, in his official capacity as Secretary of Commerce;

No. 2:20-cv-00111-RAJ

**BRIEF OF *AMICUS CURIAE*
BRADY IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

1 BUREAU OF INDUSTRY AND SECURITY;
2 CORDELL HULL, in his official capacity as
3 Acting Undersecretary for Industry and
4 Security; RICH ASHOOH, in his official
5 capacity as Assistant Secretary of Commerce
6 for Export Administration,

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Brady is a § 501(c)(3) non-profit corporation. No publicly held corporation holds its stock.

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STATEMENT OF INTEREST

Brady is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Its membership includes individuals who are concerned with, and affected by, public health and safety issues stemming from gun violence. Brady has a substantial interest in ensuring that state and federal laws are not interpreted or applied in a way that would jeopardize the public's interest in protecting individuals, families, and communities from the effects of gun violence. Brady submitted comments on the rules that are at the center of this litigation. *See* Ex. 2 (Brady Comments on the Proposed Rules). Brady has also filed numerous briefs as *amicus curiae* in cases involving the constitutionality and interpretation of gun laws, including in *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247 (W.D. Wash. 2018), and *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016). Brady submits this brief in support Plaintiffs' position that Defendants failed to provide adequate notice and opportunity to comment on the State and Commerce Departments Final Rules.

INTRODUCTION

The Administrative Procedure Act requires an agency to notify the public of—and provide the public with an opportunity to comment on—the agency's intention to change an existing regulation or to promulgate a new regulation. *See* 5 U.S.C. §§ 553(b), 553(c), 551(5). Adequate notice “is crucial to ‘ensure that agency regulations are tested via exposure to diverse public comment,’ ‘to ensure fairness to affected parties,’ and ‘to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.’” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010) (citation omitted).

The Ninth Circuit has held that when a court considers whether an agency has satisfied the notice requirement of the APA, the “essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft [proposal].” *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). Thus, for example, where an agency “embrace[s] an entirely different standard” in the final rule than the standard that was proposed, the reviewing court should hold the agency's actions in promulgating the final rule unlawful

1 because the agency has failed to afford interested parties the opportunity to comment on whether
2 the change in the permit “conformed to the substantive requirements” of the law. *Id.* at 1189.

3 That is precisely what happened here. The State and Commerce Departments have
4 promulgated rules that will de-regulate the technical information—that is, the computer files—
5 necessary to manufacture 3D printed guns. The agencies rules will accomplish this change by
6 transferring the responsibility to regulate technical information related to 3D printed guns from
7 the State Department to the Commerce Department. Brady was able to glean that much from the
8 notices of proposed rulemaking. But what Brady did not know—and could not have discovered
9 by examining the proposed rules—was the agencies’ intent to construct an entirely new standard
10 to regulate the export of the technical information necessary to manufacture 3D printed guns: the
11 new provision to be codified at 15 C.F.R. § 734.7(c).

12 In its notice of final rulemaking, the Commerce Department announced—for the first
13 time—that it will retain jurisdiction over files “for the production of a firearm, or firearm frame
14 or receiver” that are “made available by posting on the internet in electronic format” and are
15 “ready for insertion” into a computer or other machine that “makes use” of the files “to produce
16 the firearm frame or receiver or complete firearm.” *Control of Firearms, Guns, Ammunition and*
17 *Related Articles the President Determines No Longer Warrant Control Under the United States*
18 *Munitions List*, 85 Fed. Reg. 4136, 4172–73 (Jan. 23, 2020) (setting out the new Commerce rule
19 to be codified at 15 C.F.R. § 734.7(c)). Neither the text nor the substance of that provision were
20 in the notices of proposed rulemaking. The topic of that provision—the computer files necessary
21 to manufacture 3D printed guns—does not appear in the notices of proposed rulemaking either.
22 Yet, the Commerce’s inclusion of this new provision in the final rule will work a substantial
23 change in the regulatory regime that governs the online distribution of 3D printed guns.

24 In promulgating this new rule, the State and Commerce Departments denied Brady—and
25 other interested members of the public—the opportunity to comment on the new provision. “A
26 decision made without adequate notice and comment is arbitrary or an abuse of discretion” as a
27 matter of law. *Nat. Res. Def. Council*, 279 F.3d at 1186 (citing 5 U.S.C. § 706(2)(A)).
28

BACKGROUND

1. The statutory and regulatory path through which the State Department currently regulates the technical information necessary to manufacture 3D printed guns begins with the Arms Export Control Act. There, Congress authorized the President, “[i]n furtherance of world peace and the security and foreign policy of the United States,” to “control the . . . export of defense articles and defense services.” 22 U.S.C. § 2778(a)(1). The President has delegated that authority to the State Department. *See* Administration of Reformed Export Controls, Exec. Order No. 13,637, § 1(n), 3 C.F.R. 223–24 (2014). And, exercising that authority, the State Department has promulgated the International Traffic in Arms Regulations. *See* 22 C.F.R. §§ 120–130. Consistent with the Act, *see* 22 U.S.C. § 2778(a)(1), the State Department’s regulations create a list—called the “United States Munitions List”—of materials that constitute “defense articles and defense services.” *See* 22 C.F.R. §§ 120.2, 121. The State Department’s regulations also provide that all firearms up to .50 caliber, and all “technical data” directly related to such firearms—that is, “[i]nformation . . . which is required for the . . . production . . . of defense articles,” *id.* § 120.10(a)(1)—are a part of the Munitions List. *See id.* § 121.1(I)(a). Persons who want to “export” items on the Munitions List—that is, “transfer[]” or “release[]” technical data to a foreign person, *id.* § 120.17(a)—must first obtain a license from the State Department. *See* 22 U.S.C. § 2778(b)(2), 22 C.F.R. § 123.1(a).

Under the current regulatory regime, the State Department has the power to prevent a person from uploading the technical information necessary to manufacture 3D printed guns to the Internet because federal law requires a person to obtain a license from the State Department before exporting items on the United States Munitions List. *See Defense Distributed*, 838 F.3d at 456; *Washington*, 318 F. Supp. at 1262 (citing 22 C.F.R. §§ 120.10, 120.11). That is, as noted above, persons who want to export items on the United States Munitions List must first obtain a license from the State Department to do so. *See* 22 U.S.C. § 2778(b)(2), 22 C.F.R. § 123.1(a). The computer files that are needed to produce a 3D printed gun are “technical data” directly related to firearms, 22 C.F.R. § 120.10(a)(1), and as a result, are included in the United States Munitions List. *See id.* § 121.1(I)(a). And posting computer files that are needed to produce a

1 3D printed gun on the Internet, where that information can be accessed by foreign nationals, is an
 2 “export” of that information. *See id.* § 120.17.

3 2. In 2018, the State Department and the Commerce Department each published a
 4 notice of proposed rulemaking announcing the federal government’s intent to make substantial
 5 changes to the regulatory regime that governs the export of firearms. *See Control of Firearms,*
 6 *Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control*
 7 *Under the United States Munitions List*, 83 Fed. Reg. 24,166 (May 24, 2018) (Commerce
 8 Proposed Rule); *International Traffic In Arms Regulations: U.S. Munitions List Categories I, II,*
 9 *and III*, 83 Fed. Reg. 24,198 (May 24, 2018) (State Proposed Rule).

10 The proposed rules silently announced the government’s intent to divest itself of the
 11 power to prevent the widespread dissemination of the technical information necessary to
 12 manufacture 3D printed guns. In particular, State proposed removing all non-automatic firearms
 13 up to .50 caliber and related technical information—including the computer files needed to
 14 manufacture a 3D printed gun—from the United States Munitions List. *See State Proposed Rule*,
 15 83 Fed. Reg. 24,198. In making that change, State disclaims its authority to regulate the export
 16 of such computer files. And if State no longer has that authority, then the agency will no longer
 17 be able to stop a person from uploading the computer files necessary to manufacture 3-D printed
 18 guns a person to the Internet.

19 Commerce’s proposed rule purported to solve that problem by providing that items
 20 removed from the Munitions List would instead be regulated by Commerce under the Export
 21 Control Reform Act and Commerce’s Export Administration Regulations. *See Commerce*
 22 *Proposed Rule*, 83 Fed. Reg. 24,166. The Export Control Reform Act authorizes Commerce to
 23 regulate the export of certain controlled commodities, software, and technology. *See 50 U.S.C.*
 24 *§§ 4801(7), 4812.* But Commerce’s proposed rule cannot not fill the regulatory void created by
 25 State’s proposed rule because the Commerce’s authority under the Export Control Reform Act is
 26 limited in a way that the State’s authority under the Arms Export Control Act is not.

27 Under the Export Control Reform Act, Commerce lacks jurisdiction to regulate the
 28 export of “published” technology or software. *See 15 C.F.R. §§ 734.3(b)(3), 734.7(a).* And

1 Commerce’s regulations define “published” technology or software as technology or software
2 that “has been made available to the public without restrictions upon its further dissemination.”
3 *Id.* § 734.7(a). So where the Arms Export Control Act and State’s regulations empower the State
4 Department to prevent a person from posting computer files that are needed to produce a 3D
5 printed gun on the Internet, the Export Control Reform Act and Export Administration
6 Regulations would render the Commerce Department powerless to prevent a person from sharing
7 computer files that are needed to produce a 3D printed gun.

8 3. Brady spotted this “significant loophole.” Ex. 2 at 8. In Brady’s comments on
9 the proposed rules, Brady noted that “if jurisdiction over technical data related to the design,
10 production or use of semi-automatic or military-style firearms transfers to [Commerce], there
11 would no longer be any controls on companies or individuals releasing such sensitive
12 information into the public domain.” *Id.* As Brady explained, “[i]t has been [State’s] long
13 standing practice to require prior authorization for any public release of . . . controlled technical
14 data, source code or software (e.g., posting controlled technical data on a public website),” but
15 Commerce “takes a less stringent approach to publicly available information, removing
16 . . . controls once the items are made public (or intended to be made public) without requiring
17 prior authorization.” *Id.* Thus, Brady warned that “if a gun manufacturer posts a firearm’s
18 operation and maintenance manual on the Internet” then the “information included in that
19 published manual would no longer be . . . subject to export controls.” *Id.*

20 Brady also warned that the loophole would result in the proliferation of 3-D printed guns.
21 As Brady pointed out, “the Fifth Circuit ordered manufacturer Defense Distributed to remove 3-
22 D printing instructions from the Internet after the State Department charged the company with
23 violating the [State Department Regulations].” *Id.* (citing *Defense Distributed*, 838 F.3d at 451–
24 76). “In contrast, under the proposed rules, such manufacturers would be able to freely release
25 3-D printing instructions and code into the public domain (and thereby enable the private
26 production of firearms overseas and in the United States), as the [Commerce Regulations] permit
27 publication of source code and technology (except encryption source code and technology)
28 without authorization from [the Commerce Department].” *Id.*

4. Last month, the State and Commerce Departments promulgated their Final Rules without closing this loophole. *See Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List*, 85 Fed. Reg. 4136 (Jan. 23, 2020) (Commerce Final Rule); *International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III*, 85 Fed. Reg. 3819 (Jan. 23, 2020) (State Final Rule).

Instead, the agencies created an entirely different kind of loophole. State’s final rule confirmed its decision to remove non-automatic firearms and related technical information—including the computer files need to manufacture a 3D printed gun—from the Munitions List. *See State Final Rule*, 85 Fed. Reg. 3819, 3823. But Commerce’s final rule included a new provision that did not appear in the Proposed Rules. *See Commerce Final Rule*, 85 Fed. Reg. at 4162. Under that new provision, which will be codified at 15 C.F.R. § 734.7(c), notwithstanding the ordinary exception from jurisdiction for “published” items, Commerce explained that it will retain jurisdiction over files “for the production of a firearm, or firearm frame or receiver” that are “made available by posting on the internet in electronic format” and are “ready for insertion” into a computer or other machine that “makes use” of the files “to produce the firearm frame or receiver or complete firearm.” *See Commerce Final Rule*, 85 Fed. Reg. at 4172–73 (setting out the new rule to be codified at 15 C.F.R. § 734.7(c)).

Section 734.7(c) creates a regulatory regime that differs substantially from the one currently in effect. First, the new regulations differ from the existing regulations because the Final Rules authorize—where current regulations would prohibit—the distribution of the technical information necessary for manufacturing 3D printed guns by any means other than “posting on the internet.” So under the Final Rules, a person could transfer the technical information necessary to manufacture 3-D printed guns to a foreign national through an email, an AirDrop, or a USB drive. Second, the new regulations also differ from the existing regulations because the Final Rules authorize—where existing regulations would prohibit—the distribution of the technical information necessary for manufacturing 3D printed guns in any format that is not readable by a 3D printer. So under the Final Rules, a person could distribute the technical

1 information necessary for manufacturing 3D printed guns in any computer language that is not
 2 readable by a 3D printer, but could easily become so. And third, the new regulations differ from
 3 the existing regulations because the Final Rules authorize—where existing regulations would
 4 prohibit—the distribution of the technical information necessary for manufacturing components
 5 of a 3D printed gun other than the firearm frame or receiver. So under the Final Rules, a person
 6 could distribute the technical information necessary for manufacturing the barrel of or magazine
 7 for a 3D printed gun.

8 Section 734.7(c) also represents a substantial departure from the State and Commerce
 9 Department's proposed rules. First, neither the substance nor the text of Section 734.7(c)
 10 appears in State and Commerce's notices of proposed rulemaking. And second, neither State's
 11 nor the Commerce's notice of proposed rulemaking mention 3D printed guns at all. Thus,
 12 although the Final Rules are similar to the Proposed Rules in that they create a new regulatory
 13 regime under which the federal government will lack the power to prevent the widespread
 14 dissemination of the technical information necessary to manufacture 3D printed guns, the new
 15 provision in the Commerce Final Rule still differs substantially from what the State and
 16 Commerce Departments proposed.

17 5. If Brady had been given the opportunity to comment on the new Section 734.7(c),
 18 it would have done so. *See generally* Ex. 1 (Decl. of Kelly Sampson). As noted above, Brady
 19 commented on the proposed rules' applicability to 3D printed guns. Brady was attentive to and
 20 interested in this issue. And if the State and Commerce Departments had given Brady the
 21 opportunity to comment on Section 734.7(c), Brady would have opined on whether the
 22 regulation of 3D printed guns through an exception to the Commerce Department's existing
 23 regulations would conform to the substantive requirements of the law.

24 **ARGUMENT**

25 The State Department and the Commerce Department violated the APA in promulgating
 26 the Final Rules at issue here. The APA requires administrative agencies like the State and
 27 Commerce Departments to provide an opportunity for notice and comment for its proposed
 28 regulations and rules. *See* 5 U.S.C. § 553(b)-(c). Although a final rule need not be the same as a

1 proposed rule, it must be a logical outgrowth of the proposed rule *See Nat. Res. Def. Council*,
 2 279 F.3d at 1186, or a second round of comment is required, *see Am. Water Works Assoc. v.*
 3 *EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Section 734.7(c) is not a logical outgrowth of the
 4 proposed rules. Brady did not have an adequate opportunity to comment on this provision. And
 5 the State and Commerce Department's failure to comply with the APA's notice requirements
 6 was not harmless. Accordingly, the State and Commerce Department's promulgation of that
 7 provision violates the APA, and the Court should vacate the final rules.

8 **I. The Commerce Department Rule to be Codified at 15 C.F.R. § 734.7(c) Is**
 9 **Not a Logical Outgrowth of State and Commerce's Proposed Rules.**

10 1. The APA requires agencies to provide notice of the "terms or substance" of
 11 proposed regulations and to provide an opportunity for the public to comment on its proposals. 5
 12 U.S.C. § 553(b), (c). While a final rule need not be "identical" to the proposed rule, "a final rule
 13 which departs from the proposed rule must be a logical outgrowth of the proposed rule." *Nat.*
 14 *Res. Def. Council*, 279 F.3d at 1186 (citation omitted). Thus, where an agency "embrace[s] an
 15 entirely different standard" in the final rule than the one that was proposed, the reviewing court
 16 should hold the agency's actions in promulgating the final rule unlawful. *Id.* at 1189.

17 Here, the State and Commerce Department's notices of proposed rulemaking tacitly
 18 indicated that the federal government would divest itself of the power to prevent the widespread
 19 dissemination of the technical information necessary to manufacture 3D printed guns. In
 20 particular, State proposed removing certain non-automatic firearms and related technical
 21 information—including the computer files needed to manufacture a 3D printed gun—from the
 22 United States Munitions List. *See* State Proposed Rule, 83 Fed. Reg. 24,198. Commerce's
 23 proposed rule purported to solve the problem created by State's proposal to deregulate this group
 24 of firearms by regulating the items removed from the Munitions List. *See* Commerce Proposed
 25 Rule, 83 Fed. Reg. 24,166. But because the Commerce lacks jurisdiction to regulate the export
 26 of "published" technology or software, *see* 15 C.F.R. §§ 734.3(b)(3), 734.7(a), the agencies
 27 essentially announced that the federal government would be powerless to prevent the
 28 dissemination of the technical information necessary to produce a 3D printed gun.

1 By contrast, the State and Commerce Department’s notices of final rulemaking indicated
2 that the federal government would regulate the dissemination of the technical information
3 necessary to manufacture 3D printed guns, albeit ineffectually. In particular, Commerce’s final
4 rule contained a provision that appears to have been specifically drafted to address the
5 dissemination of technical information related to 3D printed guns. Under that new provision,
6 which will be codified at 15 C.F.R. § 734.7(c), notwithstanding the ordinary exception from
7 jurisdiction for “published” technology or software, Commerce explained that it will retain
8 jurisdiction over files “for the production of a firearm, or firearm frame or receiver” that are
9 “made available by posting on the internet in electronic format” and are “ready for insertion”
10 into a computer or other machine that “makes use” of the files “to produce the firearm frame or
11 receiver or complete firearm.” Commerce Final Rule, 85 Fed. Reg. 4136,4172–73.

12 Thus, prior to the publication of the final rules, the agencies gave no indication that they
13 would develop a specific regulation to address the threat posed by the online dissemination of
14 technical information related to 3D printed guns. Indeed, prior to the publication of the final
15 rules, the agencies had tacitly conveyed that they did not intend to regulate technical information
16 related to 3D printed guns at all. Commerce all but acknowledged the fact that it was flipping
17 the regulatory switch from “off” to “on” when it said in the notice of final rulemaking that “[a]t
18 the time of the proposed rule, [Commerce] believed that its existing framework struck the
19 appropriate approach in providing for national security and foreign policy control of firearms”
20 that would transfer from the Munitions List, but “[s]ince that time, [Commerce] has had
21 considerable time to review the comments related to 3D printing of firearms,” and concluded that
22 “the framework of [Commerce] regulations as described in the proposed rule did not adequately
23 address” the issue of “regulating the unlimited access to certain files for the 3D printing of
24 firearms.” Commerce Final Rule, 85 Fed. Reg. 4136, 4141–42.

25 The addition of an entirely new provision is not the sort of deviation from the proposed
26 rule that is allowed under the APA as a logical outgrowth of the proposals on which the public
27 had the opportunity to comment. “Something is not a logical outgrowth of nothing.” *Env’tl.*
28 *Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citation omitted); *see also, e.g.,*

1 *Alameda Health Sys. v. Ctrs. for Medicare & Medicaid Servs.*, 287 F. Supp. 3d 896, 918 (N.D.
2 Cal. 2017) (final rule was not a logical outgrowth where challenged provision was “not
3 mentioned at all” in the proposed rule).

4 2. The conclusion that the Section 734.7(c) is not a logical outgrowth of the State
5 and Commerce Department’s proposed rules is underscored by the record that was before the
6 agency. As the Ninth Circuit has explained, “in determining the adequacy of [an agency’s]
7 notice and comment procedure,” the “salient question” is “whether interested parties reasonably
8 could have anticipated the final rulemaking from the draft.” *Nat. Res. Def. Council*, 279 F.3d at
9 1187 (internal quotation marks and citation omitted). Put another way, where the final rule’s
10 substance is “‘not foreshadowed in proposals and comments advanced during the rulemaking,’ it
11 will not be considered a ‘logical outgrowth’ because it may catch interested parties by surprise.”
12 *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1073 (N.D. Cal. 2007)
13 (quoting *Nat. Res. Def. Council*, 279 F.3d at 1188).

14 But Commerce does not cite any comments that foreshadowed the agency’s adoption of
15 the specific requirements set out in Section 734.7(c). That is, Commerce does not cite any
16 comments showing that the public supported Commerce’s decision to “tailor[]” the new Section
17 734.7(c) so that “only technology or software for the complete firearm, its frame, or its receiver
18 are subject to [Commerce] licensing requirements” 85 Fed. Reg. 4136, 4142. Commerce does
19 not cite any comments to show that the public approved of Commerce’s decision to “craft[] its
20 rule to regulate dissemination” in the “electronic format that the internet provides.” *Id.* And
21 Commerce does not cite any comments to show how the public was involved in helping the
22 agency “reach[] the conclusion” that “technology and software ready for insertion into an
23 automated manufacturing tool” should be the focus of the rule. *Id.*

24 The agencies’ inability to cite comments regarding the new Section 734.7(c) underscores
25 the fact that the State and Commerce Departments “clearly caught [public commenters] by
26 surprise.” *Nat. Res. Def. Council*, 279 F.3d at 1188 (citation omitted). By contrast, cases finding
27 that an agency rule was a logical outgrowth of the rulemaking identify clear connections between
28 the proposed rule and the issues extensively discussed in public comments. *See, e.g., Env’tl. Def.*

1 *Center, Inc. v. U.S. EPA*, 344 F.3d 832, 852 (9th Cir. 2003) (final rule was a “logical outgrowth”
 2 where it “contain[ed] no elements that were not part of the original rule”); *Foss v. Nat’l Marine*
 3 *Fisheries Serv.*, 161 F.3d 584, 591 (9th Cir. 1998) (agency’s adoption of application deadline
 4 was valid where public comment was “extensive” and included “specific references” to the
 5 deadline issue); *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990) (EPA’s adoption of
 6 provisions “strongly recommended” by public commenters was “very much in character with the
 7 original proposal and a logical outgrowth of the notice and comments”). There is no such
 8 connection between the proposed and final rules is here.

9 **II. Brady Did Not Have Adequate An Adequate Opportunity to Comment on**
 10 **the Commerce Department Rule to be Codified at 15 C.F.R. § 734.7(c).**

11 Brady did not have an adequate opportunity to comment on the final rules. To be sure,
 12 Brady submitted comments regarding how the proposed rules would affect the regulation of
 13 technical information related to 3D printed guns. *See* Ex. 2. In particular, Brady commented on
 14 a loophole in the State and Commerce Department’s proposed rules that would have deregulated
 15 the dissemination of technical information related to 3D printed guns. But Brady did not
 16 comment on Section 734.7(c). Brady was not able to develop or express its views regarding
 17 whether Commerce should promulgate a regulation to specifically address the dissemination of
 18 the technical information necessary to manufacture a 3D printed gun. Brady was not able to
 19 express its views about Commerce’s decision to regulate some, but not all components of a 3D
 20 printed gun. Brady was not able to express its views about Commerce’s decision to regulate
 21 some, but not other electronic formats for the technical information necessary to manufacture a
 22 3D printed gun. And Brady was not able to express its views about Commerce’s decision to
 23 regulate technical information that is “ready for insertion” into a 3D printer, but leave
 24 unregulated technical information that can easily be made ready for insertion. Put another way,
 25 Brady’s comments on the proposed rules’ implications for 3D printed guns cannot reasonably be
 26 viewed as comments on the final rules’ Section 734.7(c). That provision is entirely new. As
 27 would be Brady’s comments on that provision.
 28

III. The State and Commerce Departments' Failure to Comply with the APA's Requirements Was Not Harmless.

Nothing about the circumstances of this case indicates that the State and Commerce Departments should be excused from complying with the APA's requirements. See *California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018) ("The failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'") (citation omitted). The agencies did not, for example, simultaneously called for the public's views on the issue pursuant to a different statute. Cf. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 763–64 (9th Cir. 1986). Nor did the agencies merely make a technical violation, such as publishing the final rule earlier than described in the governing statute. Cf. *Cty. of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984).

To the contrary, the agency error at issue here implicates the most fundamental of APA's rulemaking requirements: the requirement that agencies "shall" publish a "notice of proposed rulemaking ... in the Federal Register," and the requirement that agencies "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the agency's consideration. 5 U.S.C. § 553(b), (c). The word "shall" indicates a "command that admits of no discretion" on the agency's part. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661–62 (2007). Consequently, "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. *Nat. Res. Def. Council*, 279 F.3d at 1186 (citing 5 U.S.C. § 706(2)(A)). See, e.g., *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) (rejecting a harmless error claim where an agency failed to comply with notice-and-comment requirements); *Empire Health Found. for Valley Hosp. Med. Ctr. v. Price*, 334 F. Supp. 3d 1134, 1163 (E.D. Wash. 2018) (same). Therefore, this Court should not excuse the State and Commerce Department's failure to comply with the requirements of the Administrative Procedure Act here.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

HOGAN LOVELLS US LLP

By: s/ Neal Kumar Katyal
Neal Kumar Katyal
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel: (202) 637-5528
Fax: (202) 637-5910
neal.katyal@hoganlovells.com

FRIEDMAN | RUBIN PLLP

By: s/ Ronald J Park
Ronald J. Park
FRIEDMAN RUBIN PLLP
WSBA #54372
1109 1st Avenue, Suite 501
Seattle, WA 98101
Phone: (206) 501-4446
rpark@friedmanrubin.com

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED February 20, 2020.

HOGAN LOVELLS US LLP

By s/ Neal Kumar Katyal
Neal Kumar Katyal
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel: (202) 637-5528
Fax: (202) 637-5910
neal.katyal@hoganlovells.com

FRIEDMAN | RUBIN PLLP

By: s/ Ronald J Park
Ronald J. Park
WSBA #54372
1109 1st Avenue, Suite 501
Seattle, WA 98101
Phone: (206) 501-4446
rpark@friedmanrubin.com

Attorneys for Amicus Curiae